

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTOPHER HUDSON,)	
)	
Claimant,)	IC 01-006381
v.)	IC 01-514421
)	
COEUR d'ALENE MINES CORPORATION,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSIONS AND ORDER
and)	
)	filed May 23, 2006
IDAHO STATE INSURANCE FUND,)	
)	
Surety,)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. The case was re-assigned to the Commissioners on July 21, 2005. Commissioners James F. Kile and R.D. Maynard conducted a hearing in Coeur d'Alene, Idaho, on July 28, 2005. Claimant was present and represented by Louis Garbrecht. Paul J. Augustine represented Defendants Employer and Surety. The parties submitted oral and documentary evidence. Three post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter is now ready for decision.

ISSUES

After due notice to the parties, the issues were identified as:

1. Determination of Claimant's average weekly wage;
2. Whether and to what extent Claimant is entitled to the following benefits:

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- a. Temporary partial and/or temporary total disability benefits (TPD/TTD);
- b. Permanent partial impairment (PPI);
- c. Disability in excess of impairment, up to and including 100% total permanent disability; and
- d. Medical care.

The parties stipulated at hearing that Claimant's average weekly wage amounted to \$659.23.

That issue is, therefore, no longer a subject of this litigation. Also, Claimant presented no argument concerning his claim for 100% total permanent disability. As a result, the Commission will consider that issue waived by Claimant.

CONTENTIONS OF THE PARTIES

Claimant contends that he suffers from neck and right arm pain, right hand problems, memory and concentration difficulties, and depression as the result of his February and September 2001 industrial accidents. Claimant asserts he is in need of further medical care to address his depression. He alleges entitlement to TTD benefits until he reaches medical stability. Claimant also argues that he is entitled to additional PPI based on the opinion of Robert B. Burr, Ph.D. Finally, Claimant maintains that he is entitled to a substantial award of permanent partial disability.

Defendants argue Claimant has offered no substantial or competent evidence that he suffers any disability in excess of impairment. Defendants claim that medical and vocational evidence supports Claimant's return to medium duty work and jobs which are available within Claimant's labor market. Claimant is simply unmotivated to return to meaningful employment. Defendants assert Claimant is not entitled to additional medical care, including psychological treatment and/or impairment. They argue in the alternative that any cognitive impairment Claimant has suffered is mild, not moderate as Claimant contends.

Claimant did not file a reply brief.

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EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony by Claimant, Kathy Hudson (Claimant's spouse), Richard L. Hudson (Claimant's father), Larry Nelson (Employer's Human Resource Director), and Terry Parsons (former Industrial Commission vocational rehabilitation consultant);
2. Claimant's Exhibits 1 through 24 admitted at hearing;
3. Defendants' Exhibits A through S admitted at hearing;
4. The pre-hearing deposition of Claimant taken by Defendants on July 30, 2003; and
5. The post-hearing depositions of Robert B. Burr, Ph.D., with Exhibits 1 and 2, taken by Claimant on September 27, 2005, Craig W. Beaver, Ph.D., with Exhibit 1, taken by Defendants on October 20, 2005, and Michael Weiss, M.D., with Exhibit 1, also taken by Defendants on October 20, 2005.

All objections made during the course of the above-referenced depositions are overruled. After having fully considered the above evidence and arguments of the parties, the Commission hereby issues its decision in this matter.

FINDINGS OF FACT

1. Claimant began working for Employer as a mine laborer, first class, on May 24, 2000. On February 20, 2001, Claimant sustained a laceration that extended from his mid-forehead to the right side of his nose when a rock fell from the ceiling of the mine (first accident). Claimant was treated by Antoine Sarkis, M.D., and received multiple stitches. He returned to work the following day with a light duty release. Claimant was returned to full duty work with no restrictions on March 8, 2001.

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2. After continuing to complain of neck pain and some right extremity numbness, Claimant was referred to Jeffrey McDonald, M.D., Ph.D., for consultation. Dr. McDonald noted Claimant's February industrial accident. He interpreted an April 2001 MRI to reveal mild cervical spinal stenosis at C4-5 and C5-6, without true compression of the cord or neural elements. *See:* Claimant's Exhibit 5. Dr. McDonald ordered an EMG to rule out C7 radiculopathy and released Claimant to light duty pending the results. The EMG indicated C7 root irritation that the doctor believed was likely the cause of Claimant's continued tingling and numbness. Claimant reported feeling better and wanted to return to full duty work. Dr. McDonald opined, "I believe it is safe for Chris to try to return to mining. Short of another serious accident, such as the one which produced these current radicular symptoms, I think he will do just fine on the job site." *See:* Defendants' Exhibit B.

3. Claimant sustained another industrial accident on September 11, 2001. After checking debris in front of a "mucker," a rock or "slab" fell from the ceiling of the mine, landing on Claimant's hardhat (second accident). Claimant was knocked unconscious and does not remember the incident. There were no other witnesses. Co-workers found him and revived him. Frederick Haller, M.D., documented the incident as follows:

He was sitting in a mucker and, apparently a slab fell out of the ceiling and landed on his [sic], he was bent over and hit the back of his head and upper shoulders. The slab became lodged on the fender of the mucker itself. He was knocked to the ground. He does not remember anything after getting out of the mucker. The slab was pulled off of him and he seemed to be fine, only had some mild discomfort between his shoulder blades. There was 2 hour [sic] left of the shift so he just sat around and said he was feeling fairly well by the time the shift ended.

See: Claimant's Exhibit 1. After reviewing x-rays, Dr. Haller noted his impression as a cervical strain with a possible compression fracture. He prescribed Lortab for pain, took Claimant off work, and started him on a Medrol dosepak. Additional x-rays taken at Shoshone Medical Center showed

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no evidence of acute traumatic injury to Claimant's cervical spine. *See*: Defendants' Exhibit A.

4. Claimant reported back to Dr. McDonald on September 14, 2001, after the second accident. Dr. McDonald noted clear signs of a musculoskeletal strain injury to the neck. He believed Claimant displayed symptoms of post-concussive syndrome along with a cervical strain injury with a radicular component. *See*: Defendants' Exhibit B. An MRI showed cervical spinal stenosis at C4-5 and C5-6, which Dr. McDonald characterized as congenital with an additional degenerative component. Flexion and extension x-rays revealed no instability or fracture. Dr. McDonald prescribed physical therapy.

5. At a follow-up appointment on September 28, 2001, Dr. McDonald noted that although Claimant's neck and arm symptoms were somewhat better, he was still experiencing neurocognitive deficits. "He and his family have noted short-term memory problems, persistent spells of dizziness, and almost a sense of 'blackout' spells with headaches." *See*: Claimant's Exhibit 5. Based on Claimant's symptoms of post-concussive syndrome Dr. McDonald recommended a formal neurocognitive evaluation by Dr. Burr. *See*: Defendants' Exhibit B.

6. Dr. Burr conducted a neuropsychological evaluation of Claimant on October 5, 2001 and opined Claimant's test results were consistent with a history of mild to moderate head injury. *See*: Claimant's Exhibit 10. Dr. Burr suggested that Claimant continue to take his prescription antidepressant medication, utilize compensatory strategies (use of a calendar and/or day planner) to accommodate his disorientation and memory problems, attend parenting class to help cope with the demands of single-parenting, and not return to his previous work position "due to the physical risks associated with mining and the possibility of increased cognitive and neurobehavioral deficits that could follow an additional head injury." *See*: Claimant's Exhibit 10. Dr. Burr noted that most

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people report maximal recovery between nine and eighteen months post-injury and suggested a reevaluation in one year.

7. Following his neurocognitive evaluation by Dr. Burr, Claimant returned to Dr. McDonald who noted serious neurocognitive difficulties “related to Mr. Hudson’s two previous closed head injuries.” *See:* Claimant’s Exhibit 5. Dr. McDonald went on to report:

I agree entirely with Dr. Burr’s assessment, as well as his recommendations for ongoing care. I agree that Mr. Hudson is unsuitable to return to work as a miner, and should be placed on full disability in this regard. I would support a program of vocational rehabilitation for him, as there are probably some jobs that he would be suitable for. . . . Mr. Hudson’s ongoing difficulties with chronic headaches, dizziness, and short-term memory loss remain problematic.

See: Claimant’s Exhibit 5. Dr. McDonald recommended additional physical therapy for Claimant’s intermittent difficulties related to his cervical strain.

8. In October 2001, Anthony Branz, M.D., noted persistent cervical pain, black outs, memory loss, and depression. Claimant reported discontinuing his anti-depressant medication three weeks earlier. Dr. Branz restarted Claimant on an anti-depressant and recommended moist heat massage and a return to Dr. McDonald for Claimant’s cervical complaints.

9. Robert Friedman, M.D., performed a review of Claimant’s medical records at the request of Surety in December 2001. Dr. Friedman opined that Claimant’s head injury was mild at best. He believed Claimant would benefit from participation in the Idaho Elks Rehabilitation program.

The brain injury program would be the optimal place to aggressively treat his depression, both with counseling and psychotropic medications, and clearly define the extent of his neurocognitive dysfunction secondary to his mild brain injury of September 11. I am of the opinion that there is no medical evidence to support the reported previous brain injury. The patient sustained lacerations but no loss of consciousness, and there is no medical record to support neurocognitive dysfunctions after the September injury.

See: Claimant’s Exhibit 12. Dr. Friedman attributed Claimant’s depression to his pre-existing

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anxiety disorder and not his industrial injury.

10. On December 17, 2001, Dr. Beaver also completed a review of Claimant's medical records at the request of Surety. Dr. Beaver acknowledged the reports of Drs. McDonald and Burr that recommended Claimant not return to work as a miner. Based on his review of the records available, Dr. Beaver found that "there are certainly suggestions that Mr. Hudson may have reason to have some chronic pain difficulties that would warrant further evaluation and treatment." *See:* Claimant's Exhibit 13. Dr. Beaver opined that additional information and evaluation was needed to adequately assess the severity and possible consequences of Claimant's brain injury. Dr. Beaver agreed that treatment at Idaho Elks Rehabilitation Hospital (Idaho Elks) would be beneficial for Claimant.

11. Idaho Elks conducted a neuropsychological evaluation of Claimant on January 25, 2002. Dr. Beaver was the evaluating psychologist. Claimant denied any prior mental health history, care or treatment. *See:* Claimant's Exhibit 13. Dr. Beaver found Claimant evidenced significant, but relatively mild, neurocognitive difficulties consistent with a history of mild traumatic brain injury. In testing, Claimant exhibited some mild inefficiencies in his learning and retaining of new information that were consistent with his complaints. Dr. Beaver believed Claimant had the capacity to return to work in mining, but recommended a graduated return to work. After considering Claimant's attention and memory problems Dr. Beaver recommended Claimant not work with explosives, that he be teamed with other co-workers and that he work primarily with machinery, with additional training for any new machinery in order to ensure Claimant's safety. *See:* Claimant's Exhibit 13.

12. On January 23, 2002, Terry Parsons, Industrial Commission Rehabilitation Division

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(ICRD) consultant, requested information from Idaho Elks regarding Claimant's possible restrictions and return to work status. Dr. Beaver and Nancy Greenwald, M.D., replied that Claimant was to return to light duty, with a graduated return to work. It was advised that he not work with explosives and only perform minimal overhead work.

13. Upon his discharge from Idaho Elks on January 25, 2002, Claimant had full range of motion in his neck and his right arm had shown good improvement in range of motion as well. *See:* Defendants' Exhibit J. His grip strength and memory had also improved. However, Dr. Beaver thought his head injury was still affecting his high level cognitive skills.

14. At a follow up appointment on February 25, 2002, Claimant continued to report problems with cervical spine muscle spasms and pain. The chart notes indicate that an MRI accomplished on Claimant's neck revealed bulging disks in his cervical spine. He was back working light duty, four hours a day. Physical therapy was recommended.

15. On April 6, 2002, Claimant's girlfriend found him lying facedown on the bedroom floor. Claimant was taken by ambulance to the emergency room of Shoshone Medical Center. He reported neck pain with right arm weakness and numbness. Claimant recalled experiencing a "twinge" in the right side of his neck while lifting something at work on April 2, 2002 (third accident - unreported). Regarding this incident, Claimant testified to doing timber repair at work, which entailed lifting 10 x 10s into place as support for the mine. It was during this activity that Claimant felt the "twinge" and actually fell to his knees. *See:* Hearing Transcript, p. 81, ll. 5-19. Following the "twinge," Claimant experienced increased, progressive pain in the right side of his neck. While at Shoshone Medical Center Claimant was attended to by M.A. Janzen, M.D., and Terry Spohr, PA-C. Claimant's head and cervical spine CT's were negative. *See:* Defendants'

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Exhibit A. He was diagnosed with neck pain with radiculopathy and advised to remain off work pending further evaluation.

16. Claimant was seen for follow up on April 10, 2002. PA-C Spohr noted he was complaining of right-sided trapezius pain with pain into the right arm and weakness. Claimant reported that his depression was much better. PA-C Spohr noted “he isn’t recovering all that well and has been re-injured again a few weeks ago while lifting timber.” *See:* Claimant’s Exhibit 1.

17. At a follow up appointment with Dr. McDonald on April 26, 2002, the doctor noted Claimant was apparently cleared to return to mining “directly against my stated advice.” *See:* Defendants’ Exhibit B. Dr. Beaver had recommended a “graduated return to work” with specific limitations and instructions. Claimant was reporting excruciating and incapacitating pain after attempting to cut and move timber. Dr. McDonald restricted Claimant to no lifting more than 20 pounds, no prolonged work overhead, no work underground “as I believe this is an unacceptably dangerous assignment for Mr. Hudson given his documented multiple closed head injuries in the past,” and team work with a co-worker as originally recommended by Dr. Beaver. *See:* Claimant’s Exhibit 5.

18. On May 20, 2002, PA-C Spohr documented that Claimant was still having problems with spine pain and disc pain. She diagnosed Claimant’s condition as cervical spine osteoarthritis and disc disease.

19. At the request of Surety, Dr. Michael Weiss performed an IME on July 16, 2002. Dr. Weiss found Claimant to be stable and ratable for a determination of impairment. He opined Claimant’s impairments were principally due to his depression, anxiety and degenerative cervical spine changes, which he did not consider to be related to Claimant’s 2001 industrial accidents. Dr.

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Weiss found no convincing evidence of a significant cognitive impairment related to the industrial injuries. He assessed 5% whole person impairment related to Claimant's complaints of muscle pain in his cervical spine, and apportioned 3% to pre-existing degenerative cervical spine disease. He assessed no impairment for Claimant's concussion "since this is not well documented in the history." *See:* Claimant's Exhibit 16. Dr. Weiss thought Claimant should be restricted to medium work – 50 pounds maximum and 25 pounds frequently. He related these restrictions entirely to Claimant's pre-existing cervical spine condition. Dr. Weiss noted that Claimant's time of injury job was not appropriate medium duty work.

20. On August 1, 2002, Dr. Beaver responded to the results of the independent medical evaluation (IME) conducted by Dr. Michael Weiss. Dr. Beaver differed primarily with Dr. Weiss regarding whether Claimant suffered multiple concussions. Dr. Beaver believed Claimant suffered several, albeit mild, concussive events – the most significant being the accident in September 2001. Overall, Dr. Beaver agreed with the opinions and impairment ratings offered by Dr. Weiss. Dr. Beaver opined that Claimant had essentially reached maximum medical improvement and suffered no permanent impairment for psychological or neurocognitive factors. Dr. Beaver believed it was in Claimant's best interest for him to return to work and found no psychological or neurocognitive contraindications for him returning to his previous position. *See:* Defendants' Exhibit E.

21. Claimant returned to Dr. Burr on January 7, 2003, for a neuropsychological reevaluation. Dr. Burr concluded that Claimant's cognitive functioning appeared to have remained stable since his last evaluation in 2001. He acknowledged Claimant's history of psychological difficulties, but related Claimant's current diagnosis to his work injuries and their subsequent impact on his functioning. Dr. Burr summarized the connection between Claimant's industrial injuries and his

current condition as follows:

There is a known correlation between brain injury and memory deficits, inattention, mental inflexibility, and neurobehavioral dysregulation. In addition to the emotional impact of these cognitive changes, Mr. Hudson's inability to return to work and the resulting financial stress, have led to an adjustment reaction. The accidents are an intervening variable between his previous functional state and his current dysfunctional state. As such, the accidents are related to Mr. Hudson's current functional level.

See: Claimant's Exhibit 10. Dr. Burr reiterated that Claimant should not work in a high risk environment with high risk of re-injury.

22. Terry Parsons closed Claimant's ICRD file on December 1, 2003. Surety had indicated it would not provide any further medical care, and Claimant felt he was incapable of working without additional medical treatment. *See:* Defendants' Exhibit P. Ms. Parsons indicated that Claimant was capable of working, but that it would be difficult to match his time of injury wage. Claimant's permanent restrictions were noted as lifting up to 50 pounds on an occasional basis, performing overhead activities on an occasional basis, reaching on a frequent basis, avoiding combined push, pull and twist, and allowing ad lib position changes.

23. A third evaluation was conducted by Dr. Burr on April 22, 2004. He believed, more-likely-than-not, Claimant had achieved maximal cognitive improvement. He opined that Claimant's current cognitive status is the result of multiple closed head injuries, combined with his ongoing pain suffered since his injury, and the emotional, psychosocial and financial stress that has been associated with the injuries. Dr. Burr noted that Claimant appeared to function in a routine state of health and employment prior to the industrial accidents. Claimant's impairment was rated as Class 3, moderate impairment.

24. In January 2005, Claimant presented to Dr. Branz reporting episodes of syncope (loss of

consciousness caused by diminished cerebral blood flow) ever since his mining accidents in 2001. *See:* Defendants' Exhibit D. An MRI of Claimant's brain was negative. Dr. Branz noted that Claimant's medical records did not reflect treatment for syncope since October 2001.

25. In February 2005, Dr. Beaver performed another review of Claimant's medical records at the request of Surety. Dr. Beaver believed that the cognitive status and impairment rating assessed by Dr. Burr was not related to Claimant's 2001 industrial accidents. If Dr. Burr's assessment was followed, Dr. Beaver believed that consideration of Claimant's preexisting psychological difficulties should be addressed. *See:* Claimant's Exhibit 13.

26. Claimant returned to Dr. McDonald on February 17, 2005, for a neurosurgical consultation after complaining of syncopal episodes. Claimant would develop a headache, his face would tingle, and he would pass out. Dr. McDonald noted that an MRI of Claimant's brain taken in January 2005 was unremarkable. He recommended an EEG and follow up for further neurosurgical evaluation.

27. In April 2005, after reviewing Claimant's most recent medical records, Dr. Beaver opined that Claimant suffered no psychological impairment as the result of his 2001 industrial accidents and any need for ongoing psychological treatment was unrelated to his work injuries.

28. Claimant suffers from a history of anxiety and depression. He reported experiencing anxiety to such a degree that he almost "passed out" from stress as far back as August 1992. *See:* Claimant's Exhibit 1. In 1996 he was admitted to Kootenai Medical Center after attempting an overdose of medication. He was diagnosed with major depression and reported problems with relationships and finances.

29. Claimant was 32 years old at the time of hearing. He currently resides in Osburn, Idaho,

with his wife and 3 young children. His last day of work for Employer was May 10, 2002.

DISCUSSION

Average weekly wage:

1. The parties stipulated to Claimant's average weekly wage at hearing. Claimant's average weekly wage was \$659.23 at the time of injury.

TPD/TTD benefits:

2. Idaho Code § 72-408 provides that income benefits for temporary total and partial disability shall be paid to disabled employees during the period of recovery. The burden is on the claimant to present evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980).

3. Once a claimant establishes by medical evidence that he is within the period of recovery from his original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light-duty work and that: (1) his former employer has made a reasonable and legitimate offer of employment which he is capable of performing under the terms of his release and which employment is likely to continue throughout his period of recovery, or (2) there is employment available in the general labor market which Claimant has a reasonable opportunity of securing, which employment is consistent with the terms of his light-duty work release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1219 (1986).

4. Claimant maintains that he has not reached maximum medical improvement regarding his depression and is, therefore, entitled to continuing TTD benefits until his depression is adequately treated. Defendants argue Claimant was deemed stable by several physicians and is no longer in a period of recovery that would entitle him to additional TTD benefits.

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5. Dr. Weiss found Claimant stable on July 16, 2002. Dr. Beaver agreed with Dr. Weiss. At a January 2003 follow up appointment, Dr. Burr concluded that Claimant's cognitive functioning had remained stable since his October 2001 evaluation. In April 2004, Dr. Burr opined Claimant had achieved maximal cognitive improvement. Dr. McDonald did not specifically address whether and when Claimant reached stability. However, in April 2002, he assessed permanent restrictions and appeared to agree with the return to work recommendations of Dr. Beaver.

6. Claimant seeks ongoing TTD benefits as a result of his mental health condition. There is no question that Claimant suffered from anxiety and depression issues of varying degrees prior to his 2001 industrial accidents. The great weight of medical evidence suggests that Claimant's depression had reached its pre-injury baseline by July 16, 2002. Since that time Claimant's depression and anxiety symptoms have waxed and waned as they did pre-injury. Claimant is entitled to TPD/TTD benefits through July 16, 2002, at which time his depression returned to baseline.

PPI benefits:

7. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. An "evaluation of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

8. Claimant seeks 5% whole person impairment for his cervical injuries. In addition, he seeks 40% to 60% added to his disability for his cognitive/mental impairment. Claimant contends that any deduction for pre-existing impairment is unsupported by the record. Defendants maintain that all doctors agreed with the assessment of Dr. Weiss and, therefore, Claimant is not entitled to any additional impairment.

9. Dr. Weiss rated Claimant's cervical condition at 5% whole person impairment. He apportioned 3% to Claimant's degenerative cervical spine disease. Dr. Burr opined that Claimant's cognitive deficits amounted to moderate impairment. No other physicians rated impairment.

10. It is well documented that Claimant suffered from some form of congenital and/or degenerative cervical spine condition. However, the condition of his cervical spine did not affect his ability to perform heavy labor until after a third injury, which was unreported, in 2002. A pre-existing disease or infirmity does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as found. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983). Claimant suffered no impairment in functioning as it related to his employment prior to February 2001. Because of neck pain and right arm weakness/numbness he can no longer perform heavy duty work. The Commission finds Claimant suffered 2% whole person impairment of his cervical spine as a result of the February 20 and September 11, 2001, industrial injuries.

11. Drs. McDonald, Burr, Branz, Friedman, and Beaver all agree that Claimant experienced at least a mild head injury when he was struck by a falling rock/slab on September 11, 2001. The *AMA Guides*, Fifth Edition, assesses mild impairment related to mental status between 15% and 29%

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whole person. It instructs that a person suffering mild impairment requires direction with some activities of daily living. Claimant's memory, ability to concentrate, and capacity to carry out activities of daily living (such as caring for his children and performing routine tasks) has been diminished as a result of his traumatic brain injury. Restrictions by Dr. Beaver offer persuasive evidence on this subject. Although indicating no impairment, Dr. Beaver nonetheless restricted Claimant from working with explosives, working alone and working without the aid of machinery due to his cognitive functioning. Dr. Beaver also requested additional training time for Claimant should he be required to work with new machinery. Such restrictions have not been removed. Thus, a basis to award impairment for the mild head injury exists.

12. Based on the plethora of medical documentation relating to Claimant's cognitive deficits following his September 11, 2001 industrial injury, the Commission finds Claimant suffered 15% whole person impairment as a result of his mild brain injury.

PPD/PTD in excess of impairment:

13. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no functional or marked change in the future can be reasonably expected. Idaho Code § 72-423.

An "evaluation of permanent disability" is an appraisal of the claimant's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent non-medical factors provided for in Idaho Code § 72-430. Idaho Code § 72-425.

14. The burden of proof is on the claimant to prove the existence of any disability in excess of impairment. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). The test for such determination is not whether the claimant is able to work at some employment, but whether the

physical impairment, taken with non-medical factors, has reduced the claimant's capacity for gainful activity. Account should be taken of the nature of the physical disablement, disfigurement, the cumulative effect of multiple injuries, the occupation of the employee, his or her age at the time of the accident, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographic area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. Idaho Code § 72-430(1).

15. Claimant has lost some ability to compete in an open labor market. Prior to the industrial accidents he was capable of performing heavy duty work. The weight of medical evidence supports a permanent restriction to no more than medium duty employment. The only vocational assessment indicates Claimant is capable of working, but would have difficulty matching his time of injury wage. The record lacks any further evidence regarding wage-loss or market-loss. Aside from Terry Parsons' singular analysis, Claimant failed to provide the Commission with any substantial wage-loss or market-loss evidence. Terry Parsons' reporting makes up the bulk of Claimant's disability argument.

16. Claimant is young, has a high school education, and has shown an ability to adapt to different work situations. He has also shown interest in several different occupations/trades. His doctors and therapists have provided him with compensatory strategies to attempt to overcome his memory and learning deficits in a restricted labor market. Based on the above considerations, the Commission finds Claimant is entitled to 25% PPD, inclusive of impairment.

Medical care:

17. An employer shall provide for an injured employee such reasonable medical, surgical or

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other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. Idaho Code § 72-432. The Idaho Supreme Court has held that for the purposes of Idaho Code § 72-432, medical treatment is reasonable if the employee's physician requires the treatment. *Mulder v. Liberty Northwest Insurance Company*, 135 Idaho 52, 14 P.3d 372 (2000).

18. Claimant only argues for additional medical care as it relates to his depression. Having already determined that Claimant's depression has returned to baseline, the Commission finds Claimant is not presently entitled to additional medical care as the result of his February 20 and September 11, 2001, industrial injuries.

CONCLUSIONS OF LAW

1. Claimant's average weekly wage is \$659.23.
2. Claimant is entitled to TPD/TTD benefits through July 16, 2002, at which time his depression returned to baseline.
3. The Commission finds Claimant suffered 2% whole person impairment of his cervical spine and 15% whole person impairment related to his mild brain injury as a result of his February 20 and September 11, 2001, industrial injuries.
4. Claimant is entitled to 25% PPD, inclusive of impairment.
5. Claimant is not presently entitled to additional medical care for depression as the result of his February 20 and September 11, 2001, industrial injuries.

* * * * *

ORDER

Based upon the foregoing analysis, the Commission issues the following order:

1. Claimant's average weekly wage is \$659.23.
2. Claimant is entitled to TPD/TTD benefits through July 16, 2002, at which time his depression returned to baseline.
3. The Commission finds Claimant suffered 2% whole person impairment of his cervical spine and 15% whole person impairment related to his mild brain injury as a result of his February 20 and September 11, 2001, industrial injuries.
4. Claimant is entitled to 25% PPD, inclusive of impairment.
5. Claimant is not presently entitled to additional medical care for depression as the result of his February 20 and September 11, 2001, industrial injuries.
6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __23__ day of __May_____, 2006.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
James F. Kile, Commissioner

____Dissent without comment____
R.D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _23_ day of ____May_____, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS AND ORDER** was served by regular United States Mail upon each of the following:

LOUIS GARBRECHT
1400 EAST SHERMAN AVENUE
COEUR D'ALENE, ID 83814

PAUL J. AUGUSTINE
P.O. BOX 1521
BOISE, ID 83701

_____/s/_____